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No. 90-1057

In The

Supreme Court of the United States

October Term, 1990

MARCIE MCINTIRE,

Petitioner,

v.

THE STATE OF MINNESOTA, MINNESOTA HOUSING FINANCE AGENCY; JAMES SOLEM, individually and in his official capacity as its EXECUTIVE DIRECTOR; HENRY WESLEY, individually and in his official capacities as its PERSONNEL DIRECTOR; MICHAEL HALEY, individually and in his official capacities as DIRECTOR OF HOME MORTGAGE PROGRAM,

Respondents.

Petition For Writ Of Certiorari To The Minnesota Court Of Appeals

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

I. Can a state court weigh factual issues on Summary Judgment, in conflict with federal appellate authority, under the *Pickering* balancing test for qualified immunity on claims for violation of a public employee's free speech rights under 42 U.S.C. Section 1983 and the First and Fourteenth Amendments to the United States Constitution?

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PETITIONER'S REPLY BRIEF

Petitioner Marcie McIntire respectfully prays this Court to issue a Writ of Certiorari to review the opinion of the Court of Appeals of Minnesota dated August 7, 1990 reported at 458 N.W. 2d 799 and found in the Appendix at A-1.

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner, Marcie McIntire, submits additional facts in response to the Brief in Opposition to her Petition for Writ of Certiorari. This case contains disputed *Pickering* factors that the Court determined rather than submitting them to the jury.

First, contrary to Respondents' Brief in Opposition at page 14, the Minnesota Housing Finance Agency (MHFA) did not cut off the St. Paul Intertribal Housing Board's (SPITHB) funding *before* Petitioner distributed her memorandum of December 4, 1984, but did so *after*. At a December 20, 1984 meeting of the Board of Directors of the MHFA, the Agency Board recommended no additional administrative funds to the SPITHB. (December 20, 1984 MHFA Board minutes, A-353). This was, in fact, several days after distribution of Petitioner's memorandum. Respondents' claims at page 4 of their Brief in Opposition that "after consulting with the Agency's Executive Director James Solem, Haley called the Executive Director of the SPITHB on December 6, 1984, and informed her that the Agency would no longer fund their current contract" is not supported by the record. The termination of the relationship between the MHFA and SPITHB was a Board decision made the third week of December. (McIntire depo. at 170; A-178). The Minnesota Court of Appeals in *McIntire I*, misconstrued this factual chronology as indicated in its first opinion in this case. See *McIntire v. State*, 419 N.W. 2d 799 at B-6.

Despite the SPITHB funding abuses, the Agency continued to recommend funding the SPITHB during Ms. McIntire's employment at the Agency. (Haley depo., pp.

89-90; A-311-12). The Agency continued to disburse state funds to the SPITHB through December, 1984. (A-360-1). Haley personally authorized disbursement of $33,266.94 to the SPITHB on December 3, 1984. (A-360). The MHFA Board of Directors eventually voted to discontinue funding the SPITHB despite the recommendation of the Agency staff to continue funding. (A-94).

Respondents' statement at page 14 of their Brief in Opposition that "the Housing Finance Agency had rejected future funding for the SPITHB several months before Petitioner's memo and had discontinued all current funding to the Board the day before Petitioner distributed her memo" is simply not supported by the record. (See December 20, 1984 MHFA Board minutes, A-353; Affidavit of Petitioner, A-94; McIntire depo., page 170).

Second, it remains disputed whether Petitioner's memorandum was "widely distributed" within the Indian community and the effect this had on the functions of the Agency. Petitioner's successor at the Agency, Donna Folstad, indicated she did not advise Haley that Petitioner's memorandum was "widely distributed". (Folstad depo., p. 73, A-352). This is despite Haley's indications that Ms. Folstad made the representation. Haley conducted no independent investigation into the allegations of distribution of the memorandum. (Haley depo., p. 80, A-305). Haley's apparent sole source of his claim the memorandum was "widely distributed" was hearsay from Tom Goldtooth. Haley never conferred with Petitioner about claims that her memorandum had been "widely distributed" within the community. (Haley depo., p. 80, A-305). Moreover, Haley stated he was not

concerned about reaction of members of the Indian community. (Haley depo., p. 79, A-304).

Finally, the January 10 and 14, 1985 memos to Ms. McIntire were to operate prospectively from those dates forward. (Solem depo., p. 83). Haley had no personal knowledge as to the dates of the distribution of Petitioner's memorandum. (Haley depo., p. 79-80; A-304-5). Similarly, Respondent Henry Wesley had no knowledge of any events occurring after January 14, 1985 upon which to base Petitioner's termination. (Wesley depo., p. 79, A-254). Petitioner received a favorable unemployment determination from the Minnesota Department of Economic Security when Respondents could not indicate any events justifying "willful misconduct" after January 14, 1985.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari When Disputed Factual Issues of the *Pickering* Balancing Test are Determined by a State Court Upon Summary Judgment in Conflict with Existing Federal Appellate Authority.

Marcie McIntire's reply to Respondent's Brief in Opposition is twofold. First, certain facts characterized as "absolutely beyond dispute" are disputed; and secondly, Respondents unnecessarily focus upon facts not germane to the *Pickering* balancing factors set forth in the Petition for Writ of Certiorari at pages 8-9. (Resp. Br. in Opp. -9). Respondents do not deny the importance of the conflict created by the Minnesota Court of Appeals' analysis of

the *Pickering* balancing test from existing federal appellate court authority. Instead, Respondents opt to justify a state court's alteration of established federal authority on qualified immunity in the public employment free speech context.

The Court of Appeals utilized facts taken from its earlier opinion in *McIntire I*. See A-6. Those facts, as indicated above, were in dispute. Indeed, the Court of Appeals' findings in *McIntire I* (at B-6) that the MHFA cut off the board's findings *before* McIntire distributed her memo and that the legislative auditor's report came out several days *before* are not supported or referenced in *McIntire II*.

Respondents avoid the critical issues of a state court making credibility determinations, weighing evidence, drawing inferences from testimony and evidence, instead of a jury as federal courts require. Self-serving statements made by Michael Haley, James Solem, and Henry Wesley demand evaluation by a jury rather than *de novo* review by the Minnesota Court of Appeals. Examination of Respondents' and the Minnesota Court of Appeals' focus reveals the need to submit the *Pickering* balancing factors to the jury for proper evaluation as dictated by federal caselaw.

First, the nature of the Minnesota Court of Appeals' opinion, as well as Respondents' arguments, identify the problems inherent in having the Court determine the *Pickering* balancing factors rather than a jury. Courts are not equally equipped to evaluate credibility of witnesses upon appeal, disruption of office operations, disharmony among co-workers or breach of a confidential working

relationship, and motivation of the employer for terminating the employee. It is difficult to conceive of a scenario whereby the employee's supervisor (such as Haley) can provide objective non-biased evidence on the above factors. Clearly the interest of Haley, Solem, and Wesley, as Defendants to the lawsuit, dictates that issues of credibility, truthfulness, and evidentiary weight should be determined by the jury. By removing the consideration of the six *Pickering* factors from the jury, the Minnesota Court of Appeals has effectively undermined established federal appellate authority holding the balancing of the underlying factual issues is a jury function. See Petition for Writ of Certiorari at 8-11. Respondents ignore caselaw set forth by the federal appeals courts and, instead, focus upon superfluous facts. The same balancing of the *Pickering* factors should take place in state court and federal court for claims brought by public employees for violation of 42 U.S.C. Section 1983 and the First and Fourteenth Amendments.

Assuming *arguendo* Marcie McIntire's pre-memo statements and December 4, 1984 memorandum were inaccurate, such speech is nevertheless protected. *New York Times v. Sullivan*, 476 U.S. 254 (1964). Qualified immunity does not permit Respondents to ignore the *Pickering* factors and rely on extraneous statements to justify their conduct. The federal courts have recognized such a distinction.

The Minnesota Court of Appeals' ruling conflicts with existing federal appeals court precedent that requires the *Pickering* balancing factors to be submitted to the jury rather than for the Court to determine. See Petition for Writ of Certiorari at 13. Petitioner asserts a

claim based upon violation of 42 U.S.C. Section 1983 and rights secured by the First and Fourteenth Amendments to the United States Constitution. Plaintiffs such as Marcie McIntire are entitled to the same protections under 42 U.S.C., and the First and Fourteenth Amendments to the United States Constitution, in both state and federal courts. All public employees, such as Marcie McIntire, are entitled to receive the same consideration of their claims for violation of 42 U.S.C. Section 1983 and the First and Fourteenth Amendments regardless of whether it is asserted in state or federal court. Certiorari should be granted to resolve the conflict that exists in application of the *Pickering* balancing test in state and federal courts.

CONCLUSION

For all of the above reasons, Petitioner Marcie McIntire respectfully requests that the Supreme Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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